

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

JOSEPH D. MCCAIN,)
Petitioner,) Civil Action No. 7:17cv00179
)
v.) **MEMORANDUM OPINION**
)
COMMONWEALTH OF VIRGINIA,) By: Norman K. Moon
Respondent.) United States District Judge

Petitioner Joseph D. McCain, a Virginia inmate proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Having reviewed the petition and state court online records, I conclude that McCain has not fully exhausted his state court remedies before filing this federal habeas petition and, therefore, will dismiss his petition without prejudice.

McCain challenges his 2017 convictions in the Danville Circuit Court. McCain appealed to the Court of Appeals of Virginia on April 5, 2017. While his direct appeal was pending, on April 24, 2017, McCain filed a petition for writ of habeas corpus in this court. Since McCain filed this action, the Court of Appeals of Virginia dismissed McCain's appeal on May 2, 2017 and McCain's petition for rehearing is currently pending in that court. McCain indicates in his petition, and online state court records confirm, that McCain has not presented his claims in either an appeal or a habeas petition to the Supreme Court of Virginia.

A federal court cannot grant a habeas petition unless the petitioner has exhausted the remedies available in the courts of the state in which she was convicted. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). If the petitioner has failed to exhaust state court remedies, the federal court must dismiss the petition. *Slayton v. Smith*, 404 U.S. 53 (1971). In Virginia, a non-death row felon ultimately must present his claims to the Supreme Court of Virginia and receive a ruling from that court before a federal district court may consider his claims. See Va. Code § 8.01-654.

In this case, it is clear that McCain has not finished exhausting his state court remedies before filing this action and, therefore, I will dismiss his habeas petition without prejudice.

ENTER: This 7th day of June, 2017.



NORMAN K. MOON
UNITED STATES DISTRICT JUDGE